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No.

Supreme Court, U.S.
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CLERK

In The

Supreme Court of the United States

October Term, 1986

RAYMOND C. AHLBERG, *et al.*,

Petitioners,

vs.

U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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QUESTIONS PRESENTED

1. May a federal employee be separated in violation of applicable regulations?

2. May a federal employee separated in violation of applicable regulations be denied remedy, without a finding that he or she would have been separated had the regulations been followed?

LIST OF PARTIES

The petitioners in the court cases below were:

Raymond C. Ahlberg; John J. McCall; William Cox; Thomas J. Cummings; Walter B. Day; Lawrence S. Faye; Lawrence M. Kelly; Arthur Leen; Nelson G. Newton; Ann P. Shields; Mary L. Tierney; Scheryl Williams; Dorothy M. Hayes; Sherry Firobed; Gerald F. Thurston; Donald L. Wakefield; James G. Brown; Isaiah C. Celestine; June A. Dickerson; Ruth K. Kampschroeder; Lawrence P. Lillis; Bernard S. Horowitz; Betty J. Kaufman; Daisey Janey; Hamad Negron; Jessie B. Poole; Betty M. Hunter; Sandra M. Stowers; Floye Sumida.

The respondent in the court cases below was:

U.S. Department of Health and Human Services.

TABLE OF CONTENTS

	Page
Questions Presented	i
List of Parties	ii
Table of Contents	iii
Table of Citations	iv
Opinions Below	2
Jurisdiction	2
Statutes and Regulations Involved	3
Statement of the Case	3

Reasons for Granting the Writ:

I. Refusing to nullify separations in violation of the transfer regulation conflicts with the consistent holdings by this Court that agencies must comply with their regulations and that employee removals in violation of regulations are null and void. 6

II. If the improper separations are not void as to employees who could have been properly separated, remedy cannot be denied except as a result of calculations complying with the reduction in force regulations. 11

Contents

Page

III. The court's holdings undercut the stability of federal personnel law and will leave the courts in the geographical Circuits no basis for granting or denying preliminary enforcement of transfer and reduction in force rights. 13

Conclusion 15

TABLE OF CITATIONS

Cases Cited:

Ahlberg v. Dept. of Health and Human Services, 804 F. 2d 1238 (Fed. Cir. 1986) 2

Certain Former CSA Employees v. Dept. of Health and Human Services, 21 M.S.P.R. 379 (1984) 2

Certain Former CSA Employees v. Dept of Health and Human Services, 762 F. 2d 978 (Fed. Cir. 1985) 2, 6

Morton v. Ruiz, 415 U.S. 199 (1974).....6, 7, 13

National Council of CSA Locals v. Schweiker, 526 F. Supp. 861 (D.D.C. 1981) 3, 13

Sampson v. Murray, 415 U.S. 61 (1974).....3, 13, 14

Service v. Dulles, 354 U.S. 363 (1957) 7, 13

United States v. Nixon, 418 U.S. 683 (1974).....6, 13

Contents

Page

United States ex rel. Accardi v. Shaugnessy, 347 U.S. 260 (1954) 7, 13

Vitarelli v. Seaton, 359 U.S. 535 (1959) 5, 7, 8, 9, 13, 14

Statutes Cited:

5 U.S.C. § 3503 3

28 U.S.C. § 1254 2

Other Authorities Cited:

5 C.F.R. Part 351 3

5 C.F.R. § 351.302(a) 3, 7

351 Federal Personnel Manual:

¶ 5-3 3

¶ 5-3(d)(2) 10

¶ 5-3(e) 3

Budget of the United States Government, 1988 - Appendix, I-Z47 11

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

The petitioners Raymond C. Ahlberg, *et al.*, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Federal Circuit entered on November 13, 1986.

The petitioner Floye Sumida respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Federal Circuit entered on October 6, 1986.

OPINIONS BELOW

The opinion of the Court of Appeals in the case of petitioners Ahlberg, *et al.*, is published as *Ahlberg v. Dept. of Health and Human Services,* 804 F. 2d 1238 (Fed. Cir. 1986) (Appendix, *infra,* 1a). The opinion of the Court of Appeals in the case of petitioner Sumida is unreported and appears in the appendix at 36a. The administrative decisions are found at 38a through 211a.

The cases had previously been consolidated for decision on common issues of law and fact. The Court of Appeals opinion in the consolidated case is published as *Certain Former CSA Employees v. Dept. of Health and Human Services,* 762 F. 2d 978 (Fed. Cir. 1985) (236a). The consolidated administrative decision is published as *Certain Former CSA Employees v. Dept. of Health and Human Services,* 21 M.S.P.R. 379 (1984) (377a).

JURISDICTION

The judgment of the Court of Appeals for the Federal Circuit in the *Sumida* case was entered October 6, 1986. The Chief Justice granted an application for an extension of time in which to submit a petition for writ of certiorari, setting the new deadline as February 4, 1987.

The judgment of the Court of Appeals for the Federal Circuit in the cases of the other petitioners, *Ahlberg v. Dept. of Health and Human Services,* 804 F. 2d 1238 (Fed. Cir. 1986), was issued November 13, 1986. Timely petitions for rehearing were denied on December 17, 1986 (447a-449a).

This Court is given jurisdiction to review the judgments of the Court of Appeals by 28 U.S.C. § 1254.

STATUTES AND REGULATIONS INVOLVED

The case is based on the transfer of function statute, 5 U.S.C. § 3503; the regulation implementing that statute, 5 C.F.R. § 351.302(a) and 351 Federal Personnel Manual ¶ 5-3(e); and the reduction in force regulations, 5 C.F.R. Part 351.

STATEMENT OF THE CASE

The petitioners — former employees of the Community Services Administration ("CSA") — were all separated from federal service, in violation of their entitlement to transfer to the Department of Health and Human Services ("HHS") under regulations implementing the transfer of function statute, 5 U.S.C. § 3503.[1] HHS needed only some of the over 900 employees illegally denied transfer (415a);[2] the required procedure, however, obligated HHS to accept all CSA employees, without break in employment, and then conduct a proper reduction in force, so that employees entitled to retention could be correctly identified. 351 Federal Personnel Manual ¶ 5-3. Thus, it was HHS's initial error in

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1. The regulations are found at 5 C.F.R. § 351.302(a) (1981) and 351 Federal Personnel Manual ¶ 5-3(e). At the time CSA closed, HHS denied the statute applied. The United States District Court for the District of Columbia rejected that contention, and HHS did not appeal. *National Council of CSA Locals v. Schweiker,* 526 F. Supp. 861, 864 (1981) (420a). The District Court declined to determine which particular functions transferred or which employees were entitled to transfer, holding that any HHS error on these points would be corrected on appeal to the Merit Systems Protection Board (442a). The court found that *Sampson v. Murray,* 415 U.S. 61, 90-92 (1974) barred even preliminary relief, for the back pay remedy available from the Board meant there was an adequate remedy at law (442a).

2. Shortly after the District Court decision, n. 1 above, HHS conceded that each CSA employee was identified with a function transferred to HHS (331a), and that each CSA employee thus had statutory and regulatory transfer rights (331a-332a).

refusing to recognize that CSA functions had been statutorily transferred that meant that all the CSA employees were separated on September 30, 1981, rather than transferred to HHS.

Although admitting this violation of the regulation, HHS said it would not reinstate any employee who would have been separated had a reduction in force been held concurrent with the transfer (361a-362a). HHS said further, however, that because of the government's failure to maintain records necessary to conduct a proper reduction in force, it had devised an ad hoc method for determining reduction in force retention rights, and would rely on this method to determine who should get remedy (362a-363a).

In cases consolidated before the MSPB (including petitioners' cases), the MSPB rejected the employees' argument that the removals in violation of the transfer regulations were nullities (415a). It also rejected its Administrative Law Judge's recommendation (374a) that the appellants be considered to have maintained employment status until the ad hoc reduction in force calculations began to be made in January 1982 (418a). The MSPB's disposition of the claim that the reduction in force regulations had to be followed in any remedy calculations is not clear. The decision did remand the consolidated cases for individual hearings to determine their retention rights (416a-419a).

On petition for review of the consolidated MSPB decision, the U.S. Court of Appeals for the Federal Circuit held that the erroneous failure of a federal agency to accept an employee entitled to transfer under the regulations does not render the ensuing separation a nullity (261a-262a). As to the method for determining whether an employee could have been separated through reduction in force, the court held that the *ad hoc* method violated reduction in force regulations (264a-265a), noted that the result is that some employees may have been denied the placement they were entitled to under the regulations (265a), and described the MSPB remand

proceedings as designed to enable those employees to obtain remedy (265a-266a). The court specifically rejected the contention that complying with reduction in force regulations was now impossible, stressing that HHS itself had identified a method by which the necessary records now could be created (267a-268a). Based on these findings, the court affirmed the MSPB decision (277a).

Individual MSPB hearings then commenced around the country.

The MSPB hearing officers in Seattle and Boston interpreted the consolidated board and court decisions as holding that remedy should be granted if the employee would have survived a properly conducted reduction in force concurrent with the transfer of function (197a, 224a-225a). They held that the present petitioners from those regions would have been separated had the reduction in force regulations been complied with (197a-204a). These petitioners bring two contentions to this Court. First, under *Vitarelli v. Seaton*, 359 U.S. 535 (1959), when an agency in fact does not follow required procedures and standards in separating a federal employee, the remedy is reinstatement with back pay, subject to further lawful separation action, which may not be given retroactive effect. Second, if remedy can be denied on the basis of subsequent calculations that the employee might have been removed through reduction in force, the retroactive removal cannot be effective earlier than the agency could have originally done the calculations — in this case, January 1982.

The MSPB hearing officers in Atlanta and Kansas City interpreted the consolidated board and court decisions as holding that remedy should be granted only if the employee would have survived a reduction in force conducted under the HHS ad hoc procedures (31a).[3] Thus, at these hearings only the ad hoc method

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3. When the question was finally presented to the full board, it adopted

(Cont'd)

was applied; HHS made no effort to show, and no finding was made, that these petitioners would have been separated if the reduction in force regulations had been followed. On review, the Court of Appeals held that in its decision in *Former CSA Employees* it had granted the MSPB the discretion to follow the reduction in force regulations or not (33a), and that approval of allowing separations to stand even if not achievable under the regulations was "implicit" in that decision (32a). The Atlanta and Kansas City petitioners thus make an additional contention in this Court: that federal regulations are binding on agencies, and thus the courts may not grant agencies discretion to violate them.

The Federal Circuit has now held, in a series of published opinions, that federal agencies need not comply with personnel regulations and that discharges in violation of those regulations may be condoned. Petitioners seek relief from this set of holdings.

REASONS FOR GRANTING THE WRIT

I.

REFUSING TO NULLIFY SEPARATIONS IN VIOLATION OF THE TRANSFER REGULATION CONFLICTS WITH THE CONSISTENT HOLDINGS BY THIS COURT THAT AGENCIES MUST COMPLY WITH THEIR REGULATIONS AND THAT EMPLOYEE REMOVALS IN VIOLATION OF REGULATIONS ARE NULL AND VOID.

The Federal Circuit's toleration of agency regulatory violations contradicts *United States v. Nixon*, 418 U.S. 683 (1974); *Morton*

(Cont'd)
the ad hoc procedures interpretation of the consolidated decisions. *Belton v. Dept. of Health and Human Services*, 31 M.S.P.R. 414 (1986); *Putnam v. Dept. of Health and Human Services*, 31 M.S.P.R. 427 (1986).

v. Ruiz, 415 U.S. 199 (1974); *Vitarelli v. Seaton*, 359 U.S. 535 (1959); *Service v. Dulles*, 354 U.S. 363 (1957); and *United States ex rel. Accardi v. Shaugnessy*, 347 U.S. 260 (1954). These cases uniformly held that federal agencies are bound by their regulations.

In this case, moreover, there is no dispute over the premises of the petitioners' argument: each was found to be identified with a transferred function (258a, 331a); any employee identified with a transferred function is entitled to transfer prior to any associated reduction in force, 5 C.F.R. § 351.302(a); solely because of the agency's initial erroneous failure to recognize their transfer rights, all were separated rather than being transferred. As *Vitarelli* explained, employee removals in violation of applicable regulations are illegal and of no effect:

> Because the proceedings attendant upon petitioner's dismissal from government service on qrounds of national security fell substantially short of the requirements of the applicable departmental regulations, we hold that such dismissal was illegal and of no effect.

359 U.S. at 545.

The holding is emphasized by Justice Frankfurter's partial concurrence:

> [I]f dismissal from employment is based on a defined procedure, even though generous beyond the requirements that bind such agency, that procedure must be scrupulously observed. See Service v. Dulles, 354 US 363 [ ]. This judicially evolved rule of administrative law is now firmly established and, if I may add, rightly so. He that takes the procedural sword shall perish with that

> sword. Therefore, I unreservedly join in the Court's main conclusion, that the attempted dismisal of Vitarelli in September 1954 was abortive and of no validity because the procedure under Department of Interior Order No. 2738 was invoked but not observed.

359 U.S. 535, 547 (separate opinion).

The Court of Appeals distinguished this case from *Vitarelli* on the ground that here, had the agency desired to do so it could have carried out a proper reduction in force and removed most of the former CSA employees:

> The present case is far removed from *Vitarelli*. There only a single employee was involved, the Court held that he had been improperly discharged from his position, and it ordered him reinstated to the position he had occupied. The present case, in contrast, involved a reduction-in-force in which more than 900 employees sought reinstatement with a new agency that had only 165 positions to fill. There is no way in which the Office of Community Services could have hired all the former employees of the Community Services Administration. Only a relatively small percentage of the Community Services Administration employees were entitled to employment at the Office of Community Services. All or most of the employees so entitled, in fact, may have been hired. We decline to extend the principle applied in *Vitarelli* (and in the other similar cases upon which petitioners rely) to the wholly different factual situation here.

(263a).

Ironically, the case for reinstatement as a remedy for an improper removal is in some senses actually stronger here than in *Vitarelli*. The Court in *Vitarelli* knew for a certainty that the agency had determined, not once but twice, to rid itself of the particular employee. Here, it may be assumed that the agency would have wanted to rid itself of numerous employees, but it is certain that as of October 1, 1981 the agency had not identified the present petitioners (or any other individuals) as targets for removal. In addition, there was no doubt in *Vitarelli* that the agency could have properly removed him on the date that it had improperly removed him. The entire litigation would have been avoided if the discharge notice had been written slightly differently. Here, HHS did not even acknowledge that the petitioners had transfer rights until November 1981 (330a-331a, 335a), so it could hardly have decided in October to separate them. Indeed, the Administrative Law Judge who heard the consolidated cases for the board had recommended that the employees at least be given back pay until the date the agency began its ersatz reduction in force calculations:

> I believe recovery of backpay from October 1, 1981 should cease as of the date the first offers of employment were transmitted to appellants in January 1982; as of that date a valid reduction in force is deemed to have been instituted, thus fixing the rights of the appellants, even though notices of non-selection were sent to some at a later date. . . . In my view, the earlier date is consistent with the theory of a constructive reduction in force in which the competing interests of CSA employees were determined and settled when the master register was established.

(374a, 375a).[4]

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4. The ALJ's recommendation was rejected by the board, on the ground that (Cont'd)

In any event, in our case the regulations are designed to bar precisely the procedure followed here — separating all the transfer-entitled employees first, and then some time later recognizing the transfer rights of some. The regulations explicitly require that the transfer rights be honored, and then, if necessary, a proper reduction in force be carried out to reduce the number of employees to those desired by the receiving agency:

> *Use of reduction-in-force regulations.* If the losing competitive area identifies and transfers more employees than the gaining competitive area needs to carry on the function, the gaining competitive area may follow reduction-in-force procedures to relieve the surplus. Competing employees identified by the losing competitive areas have a right to:
>
> (a) transfer to the gaining competitive area before it conducts a reduction in force; and
>
> (b) compete among themselves and employees in the gaining competitive area for retention under the OPM's reduction-in-force regulations.

351 F.P.M. § 5-3(d)(2).

There is no empirical evidence as to how often Congress shuts down an agency, transfers its functions to another agency, but requires the receiving agency to carry out the transferred functions with substantially fewer employees. It happened in this case and

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(Cont'd)
"there has been no specific finding of an unjustified or unwarranted personnel action." (418a).

it is planned for the Interstate Commerce Commission.[5] The important point is that the Office of Personnel Management believes the situation arises often enough to require regulation; and that regulation unequivocally guarantees transfer-identified employees the right to transfer prior to being separated through reduction in force.

II.

IF THE IMPROPER SEPARATIONS ARE NOT VOID AS TO EMPLOYEES WHO COULD HAVE BEEN PROPERLY SEPARATED, REMEDY CANNOT BE DENIED EXCEPT AS A RESULT OF CALCULATIONS COMPLYING WITH THE REDUCTION IN FORCE REGULATIONS.

The consolidated decisions said that remedy would be provided to those employees who would not have been separated had the agency carried out a reduction in force on October 1, 1981 (265a-266a). The subsequent decisions on individual cases, however, say that determination of that question is not based on a reconstruction of an actual reduction in force as of that date (31a-34a).

This holding that reduction in force regulations are irrelevant to employees' rights in reductions in force is wholly arbitrary. Neither the board nor the court gives even a hint of a reason for saying that the regulations should not be followed to determine who was injured by the original violation. On the contrary, the court's consolidated decision had gone into the details of the record

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5. "Legislation will be proposed to abolish the Interstate Commerce Commission and to deregulate completely the interstate motor freight, freight forwards, buses and waters carriers by October 1, 1987. The enactment of this legislation would eliminate a major portion of the ICC's workload. The remaining activities would be transferred to the Departments of Justice and Transportation and the Federal Trade Commission." Budget of the United States Government, 1988—Appendix, I-Z47.

to show why the only reason ever given for not following the regulations (that the government had failed to maintain adequate personnel records) was invalid:

> In directing this procedure, the Board rejected the Department's contention that the retention rights of individual employees who had not been appointed to positions with the Office of Community Services could not be determined. It stated:
>
> > We specifically reject the agency's contention that it is impossible to determine identification of the employee because of inaccurate position descriptions. . . .
>
> [W]e conclude [these findings] are supported by substantial evidence. Ms. Olivari, a department classification specialist was the only witness who had reviewed the Community Services Administration records. . . . She . . . testified that the necessary information could be obtained through a procedure known as a "desk audit," and that one could "conduct a regular desk audit after an agency has been abolished."

(267a-268a).

Once it was found that proper reduction in force calculations could still be made,[6] there was no possible justification for saying

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6. Any doubt as to the correctness of the court's finding that records could be sufficiently corrected as to be used for making proper reduction in force calculations would be dispelled by the fact that in the cases of the Seattle and Boston petitioners exactly this occurred (197a-198a).

the petitioners should be properly treated as having been separated through reduction in force even though the calculations required by the procedures have never been made.

Whether read as holding that reduction in force regulations never need to be followed, or that violations may or may not be condoned without stated reasons by an appeals court, the decisions in these cases directly violate *United States v. Nixon,* 418 U.S. 683 (1974); *Morton v. Ruiz,* 415 U.S. 199 (1974); *Vitarelli v. Seaton,* 359 U.S. 535 (1959); *Service v. Dulles,* 354 U.S. 363 (1957); and *United States ex rel. Accardi v. Shaugnessy,* 347 U.S. 260 (1954).

III.

THE COURT'S HOLDINGS UNDERCUT THE STABILITY OF FEDERAL PERSONNEL LAW AND WILL LEAVE THE COURTS IN THE GEOGRAPHICAL CIRCUITS NO BASIS FOR GRANTING OR DENYING PRELIMINARY ENFORCEMENT OF TRANSFER AND REDUCTION IN FORCE RIGHTS.

The practical effect of the Federal Circuit's decisions goes far beyond denying justice to a few dozen former federal employees. The holdings that illegal separations are not null and void, and that the Federal Circuit itself may grant the agencies discretion whether to follow regulations or not, will lead to an explosion of pre-transfer and pre-reduction in force litigation. As the District Court stressed in this very case, *Sampson v. Murray,* 415 U.S. 61 (1974), bars preliminary relief in most federal employee removal cases. *National Council of CSA Locals v. Schweiker,* 526 F. Supp. 861, 865-6 (D.D.C 1981) (437a-438a, 442a). This is because a truly improper removal will lead only to a "temporary loss of income, ultimately to be recovered," 415 U.S. at 90, on appeal from the action; since the loss will be recovered, the harm

inflicted by the violation cannot be "irreparable," and therefore preliminary relief is not available, 415 U.S. at 90-2.

If *Vitarelli* is not applicable to separations in violation of the transfer of function regulations, neither is *Sampson*. District courts will be asked to issue preliminary mandatory injunctions forcing agencies to accept employees in transfer, rather than let them be separated as a result of their not being accepted in transfer. The courts will not be able to deny the relief on the ground that, assuming the transfer regulation has been violated, the injury is merely "temporary loss of income, ultimately to be recovered," 415 U.S. at 90. On the contrary, under the Federal Circuit doctrine challenged here, there can be no recovery of damages for transfer violations; the regulation must be enforced through prior judicial injunction or not at all. The Federal Circuit's holding that it has given the board "discretion" whether to follow the regulations in adjudicating reduction in force cases similarly makes it impossible for district courts to rely on *Sampson* as a bar to preliminary relief. An agency announces that it is going to reduce in force from 900 to 200 employees, but that it is going to use some procedure of its own device in lieu of the reduction in force regulations. Unless the employees obtain preliminary relief, they risk the Federal Circuit giving the MSPE the discretion to find that removals based on ad hoc procedures are valid. If the employees do seek preliminary relief, it cannot be denied on the ground that if the agency is violating the regulation the consequence is only "the temporary loss of income, ultimately to be recovered." 415 U.S. at 61.

In short, the Federal Circuit's repudiation of the usual rule of law, exemplified by *Vitarelli*, creates a serious risk of a litigation explosion, as federal employees seek preliminary court action to enforce their rights under regulations.

CONCLUSION

For these reasons a writ of certiorari should issue to review the judgments and opinions of the Court of Appeals for the Federal Circuit.

Respectfully submitted,

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